

Be Aware Of Your Withdrawal Liability

With Incidents Of Liability On The Rise, It's Important To Know The Rules

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Construction contractors who contribute to multiemployer pension plans should be aware that they may have additional financial liability (over and above the contribution amounts stated in the contract) if the plan becomes under-funded. While the possibility of withdrawal liability has been in existence since 1980, the incidence of withdrawal liability has accelerated in the last several years due primarily to weak investment performance of these plans.

The purpose of this article is to briefly explain the essential provisions of the withdrawal liability rules and to provide a road map for contractors to identify and potentially minimize the financial consequences of withdrawal liability. Of course, because these rules are complicated, contractors with specific issues and concerns should consult with legal counsel.

DEFINITION OF WITHDRAWAL LIABILITY AND KEY CONCEPTS

The rules governing withdrawal liability

are found in the Multiemployer Pension Plan Amendments Act of 1980, which amended ERISA to impose withdrawal liability upon employers who cease contributions to a multiemployer defined benefit pension plan with unfunded vested benefits. Withdrawal liability is essentially an exit fee requiring employers to pay its share of a plan's costs (future vested benefits) which have not been paid through previous contributions or investment returns.

The funding status of a plan is determined each year by the plan's actuary. Unfunded vested benefits arise when the actuarial value of a plan's vested accrued benefits (the promised future benefits which participants have earned a right to receive) exceeds the value of the plan's assets. These calculations are influenced by various assumptions (investment rate of return, mortality, contribution hours, etc.) and by the level of benefits promised to participants. For example, if the plan does not meet its investment return assumption, an imbalance may result and unfunded vested benefits may be created or increase.

The employer's share of a plan's unfunded vested benefits is a fraction, the numerator is the employer's contributions for a five-year period and the denominator is all employers' contributions for the same five-year period. This amount can change from year to year depending on the level of unfunded vested benefits and the level

of the employer's contributions to the plan compared to all other contributing employers. However, even if a plan has unfunded vested benefits, withdrawal liability will only be assessed to an individual contributing employer under certain circumstances.

ASSESSMENT OF WITHDRAWAL LIABILITY

There are several circumstances under which a plan may assess withdrawal liability to an employer.

Complete Withdrawal

A complete withdrawal from a pension plan will occur when an employer either:

- * Permanently ceases to have an obligation to contribute; or
- * Permanently ceases all covered operations under the plan.

Partial Withdrawal

A partial withdrawal from a pension plan will occur when there is a:

- * Seventy percent contribution decline measured over a three-year period; or
- * Partial cessation of the employer's contributions to the plan under one or more but not all collective bargaining agreements requiring contributions to the plan and the employer continues to perform work in the jurisdiction or transfers such work to another location; or
- * Permanent cessation of an obligation to contribute with respect to work performed at one or more but not all facilities but continues to perform work at the facility of the type for which contributions were previously required.

MINIMIZING OR ELIMINATING WITHDRAWAL LIABILITY

There are a number of exceptions to the withdrawal liability rules.

De Minimis Rule

Withdrawal liability may be reduced by a so-called "de minimis reduction rule." Any withdrawal liability of \$50,000 (or, if less, 3/4 of one percent of the plan's unfunded vested benefits) or less is completely eliminated. Between \$50,001 and \$150,000, the reduction is \$50,000 less than the liability over \$100,000. This

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rule has the effect of exempting smaller employers from withdrawal liability.

Sale Of Assets/Stock

Certain business changes may or may not result in a complete or partial withdrawal. A sale of assets by an employer coupled with a cessation of contributors to a plan may trigger a complete or partial withdrawal unless the buyer assumes the contribution obligations and other technical requirements are satisfied. On the other hand, a sale of stock by an employer (or any other entity reorganization) will not by itself trigger withdrawal liability if there is no interruption in contribution or obligation to contribute.

Construction Industry Exemption

Another exception is the so-called "construction industry exemption" rule. Plans which cover primarily building and construction industry employees are eligible to adopt this special rule. Employers are considered construction industry employers if a substantial number (85 percent or more) of its employees for which it has a contribution obligation to the plan work in the building and construction industry.

Under this rule, withdrawal liability occurs only if the employer ceases its obligation to contribute to the plan but continues to work within the jurisdiction of the collective bargaining agreement, or returns to do the same type of work in the jurisdiction within five years, without in either case resuming contribution obligations to the plan. Therefore, if an employer goes out of business under the provisions of this rule, withdrawal liability would not be assessed. If, however, the employer continued to work in the same jurisdiction (on a non-union basis), withdrawal liability could be assessed by the plan. Partial withdrawal liability would be assessed only when a construction industry employer has substantially shifted its work mix so that only an insubstantial portion of the work is covered by that plan.

WHO IS RESPONSIBLE FOR PAYING WITHDRAWAL LIABILITY?

Any person or entity acting directly or indirectly as an employer, including affiliates and trades and businesses (whether or not incorporated) under common control. Attempts to evade withdrawal liability by going out of business and resuming business under a different name and will generally be disregarded.

Enforcement Of Withdrawal Liability

If a plan determines that it believes an employer has withdrawn from the plan, it will generally investigate the circumstances and request information from the employer, usually in a document called a statement of business affairs. The plan generally has the legal right to receive the information requested. If the plan does make a withdrawal liability assessment, the employer has ninety days to contest the assessment and request review by the plan.

Arbitration is available if a request is made within 60 days after the plan notifies the employer of its final determination, or if earlier, within 120 days of the date the employer seeks the initial review or arbitration may be initiated jointly within 180 days of the plan's initial determination. During any review period, the employer must pay all installments of assessed withdrawal liability.

ACTION PLAN FOR CONTRACTORS TO ADDRESS WITHDRAWAL LIABILITY CONCERNS

Prior to entering into a new union contract by which an obligation is imposed to contribute to a defined benefit plan, determine if withdrawal liability exists prior to signing the contract. If so, attempt to avoid contributing to the defined benefit plan, either by offering to provide other types of retirement vehicles or other financial incentives to employees.

For contractors already obligated to contribute, determine whether any of the plans have withdrawal liability. Contractors have a right to request in writing from a plan an estimate of the contractor's potential withdrawal liability.

Each plan is run by a joint board of trustees, an equal number or union trustees and management trustees, who may be appointed by an employer association. Contact the employer association and the individual management trustees to determine what steps are being taken to reduce or eliminate the plan's liability.

If changes are contemplated in the manner in which you intend to operate your business, and withdrawal liability is an issue, consider some strategic planning well in advance of any implementation date of those changes. An awareness of withdrawal liability may well lead to different business and operational procedures and structures which will have the effect of minimizing or eliminating

exposure to withdrawal liability. There is some flexibility in this regard.

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